IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

TESSIM ZORACH and ESTA GLUCK,
Appellants,

vs.

ANDREW G. CLAUSON, Jr., et al., constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,
and
THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,
Appellees.

On appeal from the Court of Appeals of the State of New York.

AMICUS CURIAE BRIEF FOR THE STATE OF OREGON

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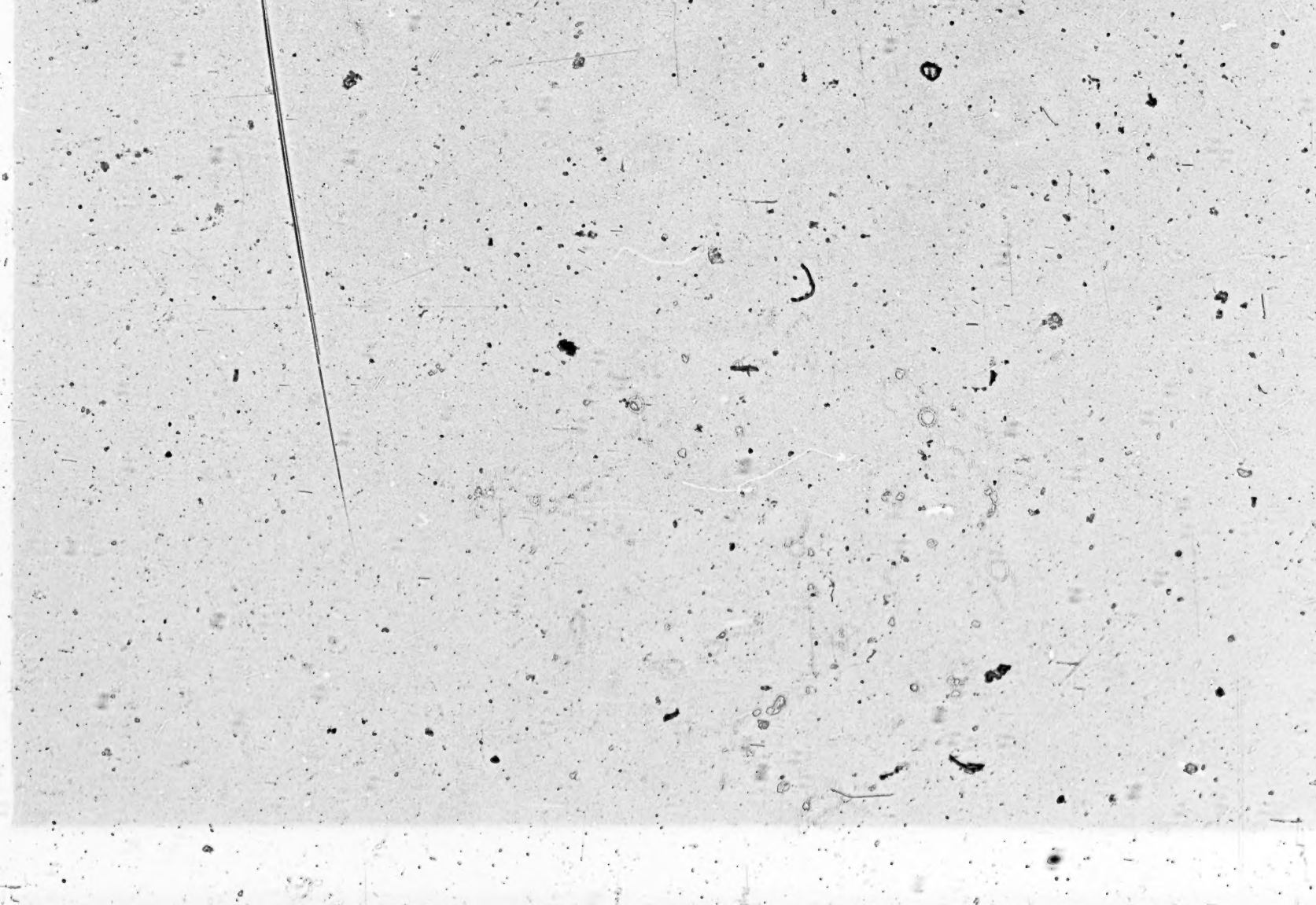

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AUTHORITY FOR AMICUS CURIAE BRIEF

This *amicus curiae* brief is respectfully submitted for the State of Oregon by its Attorney General pursuant to the Court's Rule 27(9)(d), at the request of the State Board of Education.

STATEMENT OF INTEREST OF AMICUS CURIAE

Oregon has a 1925 statute similar to the New York law involved here. Further, by Constitution and legislation, the public policy of Oregon requires equally the promotion of education and the freedom of religion. Appellants attack both the particular statute and the general policy.[1]

Appellants ask the Court to formulate a broad constitutional doctrine upon the basis of the isolated and local factual (or conclusory) hypothesis presented by this record. The Oregon situation is different from that hypothesis. But the ruling requested would invalidate the Oregon statute and policy.

If the Court wishes to pass upon a constitutional issue affecting all the States, we respectfully suggest that it may be of some value to the Court to be advised of the situation in States other than New York, including Oregon.

THE SITUATION IN OREGON

In the Oregon country "preachers preceded settlers."[2] Among the most respected leaders of the early period were the missionaries, such as Rev. Jason Lee, Dr. Marcus Whitman, Father Francois

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1—Following the decision in *McCollum v. Board of Education*, 333 U.S. 203, upon the request of the Oregon Superintendent of Public Instruction for advice, the undersigned Attorney General gave the opinion that the Oregon statute was valid. 1946-48 Ops. Or. Att. Gen., p. 473.

2—Carey, General History of Oregon Prior to 1861, vol. 1, p. 281. Cf., *Missionary Society v. Dalles*, 167 U.S. 336; *Bishop of Nesqually v. Gibbon*, 158 U.S. 155.

Blanchet, and their respective associates.[3] Church schools (supported by Baptists, "Campellites," Catholics, Episcopalians, Friends, Methodists, Presbyterians, or others) and some private schools (supported by individuals or on a subscription basis) provided education for the early settlers.[4] The principal growth of the public school system occurred later.[5]

With that background it is not difficult to understand why the people of Oregon have always regarded, as matters of supreme importance, that education and religious freedom should be *equally* promoted, and that public education should not be used to discriminate against freedom of conscience.

For example, the compact adopted by the people of the Oregon area in 1843 to provide for a provisional government "until such time as the United States of America shall extend their jurisdiction over us" contained the following clause:[6]

3—1951-52 Oregon Blue Book, pp. 189-190. Schools in the old Oregon territory established or named after these men remain as memorials to them: Whitman College in Walla Walla, Washington; Jason Lee's Oregon Institute, now Willamette University, in Salem, Oregon; Father Blanchet's parochial schools, beginning in 1842 with St. Joseph's at St. Paul, Oregon.

4—Pollard, Oregon and the Pacific Northwest, pp. 183 *et seq.*; Carey, *op. cit.*, vol. 2, ch. 27.

As elementary education, and in the past fifty years high schools, became otherwise generally available, many of these schools devoted their attention solely to higher education. At present they include: Lewis and Clark, formerly Albany College, now at Portland; Linfield College at McMinnville; Oregon State College, one time Corvallis College, at Corvallis; and Pacific University, at Forest Grove.

5—1951-52 Oregon Blue Book, p. 194.

6—Carey, *op. cit.*, vol. 1, p. 336; and see Or. L. 1854, p. 34.

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

This was adopted verbatim from the Ordinance of 1787 (see *Meyer v. Nebraska*, 262 U.S. 390, 400); and was continued as the law of Oregon by the Act of Congress organizing the territorial government (9 Stat. 329).

Again, the territory's first school law, adopted on September 5, 1849, provided that "no preference shall be given *or discrimination shown* on account of religious opinion, whether with the pupils or the teacher, nor shall any laws be enacted by any district that will or may in any way interfere with the rights of conscience in the free exercise of religious worship."[7] (Italics ours.)

The State Constitution preserved this religious freedom, sacrosanct from civil domination or discrimination. The Bill of Rights (Art. I) of the Oregon Constitution, adopted in 1857, and approved by Congress in 1859 (11 Stat. 383), provides in part:

Sec. 2. "All men shall be secured in the natural right to worship Almighty God according to the dictates of their own consciences."

Sec. 3. "No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

7—Carey, *op. cit.*, vol. 2, p. 702.

Sec. 4. "No religious test shall be required as a qualification for any office of trust or profit."

Sec. 5. "No money shall be drawn from the treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the legislative assembly."[8]

Sec. 6. "No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice touching his religious belief, to affect the weight of his testimony."

As explained by Mr. Grover, chairman of the committee on the Bill of Rights in the Oregon constitutional convention:

"It [the Oregon Bill of Rights] guarantees universal toleration upon the matters of religion, in every respect."[9]

"Our government is based upon absolute freedom of conscience, guaranteeing full toleration and protection of religious faith, but at the same time withholding state patronage and political place from the churches."[10]

8—Note, however, that sessions are opened with prayer, even though the chaplains are not paid. For example, Rule 1 of the Rules of the Oregon Senate provides in part: "At the opening of the senate, at its first session each day, if there be a minister of the gospel present, the senate shall be opened with prayer." Rule 1 of the House Rules contains substantially the same provision.

9—Carey, History of the Oregon Constitution, p. 131.

10—Id., p. 303.

Oregon first had a compulsory school law in 1889.[11] But it provided for compulsory education, *not* compulsory public education. So long as the children were educated, parents were still protected in their right to send their children to any of the many private or church schools. That right is still protected by the latest revision of the statute in 1951.[12]

For a brief interlude, by Or. L. 1923, ch. 1, Oregon attempted to compel children to attend only public schools. That act was declared unconstitutional by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510, affirming 296 Fed. 928.

It is important to note, however, that while that case was pending before this Court and had not yet been argued, Oregon adopted a statute (similar to the New York law here involved) entitled an act "To authorize excusing children attending public schools to attend schools giving religious instruction." It provides (Or. L. 1925, ch. 24; codified as O. C. L. A., Sec. 111-3014):

> "That any child attending the public school, on application of his guardian or either of his parents, may be excused from such school for

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11—Or. L. 1889, p. 111.

12—Or. L. 1951, ch. 572, sec. 4, provides in part: "In the following cases, children shall not be required to attend public full-time schools:

"(2) Children being taught in a private or parochial school in such branches as are usually taught in the first 12 years in the public schools and in attendance for a period of time equivalent to that required of children attending public schools."

a period or periods not exceeding one hundred and twenty (120) minutes in any week to attend week day schools giving instruction in religion."

Thus, even at a time when it was thought that children should receive their secular education in public schools, the Legislative Assembly recognized that the public schools did not have an inflexible secular curriculum usurping all of the child's time, and that parents were privileged to have their children receive religious instruction outside the public schools. Of course, like any privilege, its exercise was by choice.

Accordingly, the situation in Oregon now is substantially the same as that of which Thomas Jefferson[13] spoke concerning religious liberty at the University of Virginia: Religion is certainly not taught in the public school; and equally the civil authority certainly does not preclude or discriminate against religious instruction elsewhere. Jefferson said that, while in accordance with the constitutional principle a chair of divinity had not been established at the University,

> "It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society."[14]

13—This court has recognized that the provisions in the First Amendment, now applied under the Fourteenth Amendment, "had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute" which Jefferson drafted. *Everson v. Board of Education*, 330 U.S. 1, 13.

For interpretive light the Court has also referred to Jefferson's

With respect to the present Oregon practice under the particular statute in question, the Oregon Superintendent of Public Instruction has described it as follows: "With parental consent students are being released during school hours to attend week-day schools giving instruction in religion or the Bible off the school premises. Such schools may be conducted by one church denomination or several denominations may be cooperating in giving said religious instruction. Pupils not attending said classes continue with their school work."[15]

In Oregon the particular school district is given discretion in determining the hours of the school day,[16] and in making regulations for the conduct of the school.[17]

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comments on religious liberty, including his "wall of separation" letter of January 1, 1802, to the Baptists. E.g., *Reynolds v. United States*, 98 U.S. 145, 164; *Everson v. Board of Education*, supra at 16; *McCollum v. Board of Education*, 333 U.S. 203, 212.

14—*McCollum v. Board of Education*, 333 U.S. 203, 245.

The quotation continues: "On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation."

15—1946-48 Ops. Or. Att. Gen., p. 473.

16—The statute provides (Or. L. 1951, ch. 446, sec. 2):

"When in charge of a school or class, as applicable, a teacher shall: . . .

"(2) Except when a different or lesser number of hours has been ordered by the district school board, commence school at 9 a.m. and close at 4 p.m. daily with one hour for recreation at noon."

17—The statute provides (Or. L. 1951, ch. 588):

"Sec. 1. Except where statutes are inconsistent with this section, district school boards shall have entire control of their district public schools and of teachers employed by the district. . . .

"Sec. 3. Each district school board may establish rules and regulations for the government of the schools and pupils consistent with the rules and regulations of the State Board of Education."

The compulsory education law contains many exceptions. Or. L. 1951, ch. 572. Some students (i.e., legally employed children) may attend a part-time school. Others may not attend any school. A few examples of the latter include: Children who have acquired sufficient knowledge, children who live at a distance from school or available transportation, children who are being taught by parent or private teacher, children excused by the school board in certain instances.

Generally in matters affecting part-time absences of students, public school authorities act with regard to the reasonable demands of parents compatible with the needs of instruction. It is, of course, recognized that the curriculum is not so inflexible that it may not accommodate extra-curricular activities.

In many instances upon the requests of parents public school authorities, whether by formal regulation or as a matter of practice, excuse or at least raise no question about the absence of some students while others remain in school. For example, in some school districts it is a practice for students to be excused at reasonable times to take private music lessons, even though it may cause some embarrassment to the student who is so excused or to the student who is not.

To our knowledge no serious question has been raised concerning the propriety of the practices of

public school authorities, within reasonable limits and with the consent of the respective parents, permitting some students to be excused, for example, to play in a school band at some civic meeting not connected with the school, to practice with a junior symphony group not connected with the school, to assist in some civic festival not connected with the school, to ride on an early school bus so as to be home before darkness, to deliver on a newspaper route, to assist in a local agricultural crisis, or in the case of students whose class work has been of a particularly exemplary standard to play while others are taking examinations.

QUESTION PRESENTED

Where the public school has a flexible curriculum and in fact permits reasonable part-time absence for extra-curricular activities, may the public authority preclude such reasonable part-time absence on the ground that the purpose is to exercise the constitutionally guaranteed freedom of religion?

ARGUMENT

It would be presumptuous, for us, to argue the intendments of the recent opinions by members of the Court concerning religious liberty, or to reiterate arguments which have been so well stated by others. Instead, we should like to submit that, in view of the Oregon situation, any policy for this State other than that of the statute in question would be unconstitutional.

With respect to the Oregon situation, as indicated by the statutes and practices mentioned above, the public school authorities have not in fact purported to assume an exclusive and inflexible control of the child during certain hours and in certain public buildings or areas, to the extent of barring any outside extra-curricular activities. And the school authorities do not assume that there is a certain quantum of education to be poured uniformly into all students within the same designated and unvarying period of time. Some students who are attending school may find home-work necessary in non-school hours, and some may be allowed part-time absences. No one heretofore has questioned the power of the school authorities to make regulations reasonably adapted to require its educational function to be first served during school hours, or reasonably adapted to permit children outside interests.

Children attending private or parochial schools are required to attend an "equivalent" amount of time as those in public school, and it is well known that the private or parochial school may include religious instruction within that time. Under the permissive statute involved here public-school children may obtain similar instruction within the same time, but outside the public school.

As the permissive statute stands, there is no conflict between the State and the respective parent whose child is attending public school and who

wishes his child to receive religious instruction. Complaint then could be made only by a third person who does not wish to exercise that privilege, who disagrees with the legislative policy, and who wishes the civil authority to conform all others to his special persuasion in that particular. If the statute be invalid, all minorities would be required to conform to that tenet of one minority. This would defeat the primary objective of the First Amendment. *Davis v. Beason*, 133 U.S. 333, 342.

In view of the Oregon situation, any policy other than that of the statute in question would produce an unconstitutional factual result in two ways:

First, by a negative hostility to religious liberty. This basic freedom includes the right to teach, and to receive instruction in, matters of conscience. "The right of mankind to believe and teach such doctrines regarding religion as meet the approval of their consciences is recognized under our form of government as inherent; it is freely accorded to every sect and denomination in the land; . . ." *Liggett v. Ladd*, 17 Or. 89, 94, 21 Pac. 133. If the public authorities permitted part-time absence for any reasonable purpose *except* outside religious instruction, then the purported governmental aloofness from religion would in fact be used to discriminate against religious liberty.

The attack on the statute disregards one of the essential parts of the complex of religious liberty.

The critics of the legislative policy would rescue "temporal institutions from religious interference," but would *not* secure "religious liberty from the invasion of the civil authority." *Everson v. Board of Education*, 330 U.S. 1, 15; *Watson v. Jones*, 13 Wall. 679, 730.

Second, by requiring active interference with religious observances. What the civil authority could not expressly permit, it could not facitly allow. Now no question is raised if a child is absent from public school in observance of, for example, Passover or Good Friday. If such a part-time absence be forbidden by the Constitution, then it necessarily follows that the civil authority would be required to actively prevent it. Incredibly, in the United States, a truant officer would be sent to the synagogue or cathedral to recapture the child.

Constitutional liberties are not abstractions. They must exist, if at all, as realities. The necessary extension of the arguments against the instant statute would invalidate such things as Thanksgiving proclamations and Federal tax exemptions for religious corporations. Whether or not a legalistic argument can be made against such commonplaces, it is persuasive evidence of their constitutionality that they accord with both received tradition and present-day legislative and executive policies.

Our Constitution is not that of Plato's Commonwealth. Cf., *Meyer v. Nebraska*, 262 U.S. 390, 401-402.

"The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535. These obligations may properly involve instruction in the faith of his parents, free from active or passive civil interference.

The objects of the constitutional provisions involved in this case, are the protection of minorities—to enable them to exercise freedom of conscience, freedom in worship and religious instruction; to relieve them from being compelled to attend any State church or State-supported church; to send their children to State-supported schools in which religious instruction in any faith other than their own, is a part of the school curriculum; to protect them from being mulcted by taxation to support either a State church or churches, or State schools teaching religious beliefs or dogmas; in short, it was to permit the dissenting individual citizen from having any religious faith or religious instruction imposed upon him or his children, from being compelled, directly or indirectly, to have thrust upon him or them the tenets or doctrines of any faith and to be freed from directly or indirectly contributing to the support of the principles of any faith.

Neither the New York nor Oregon statutes infringe upon any of these objectives. They merely recognize the inherent constitutional rights of every citizen and every parent to choose his own beliefs, to practice them, to worship as he chooses and to carry out what he deems to be his duty to his children that they shall have a reasonable opportunity to be instructed in the tenets of his faith. These statutes require no financial support from the State, no use of school buildings or facilities, no control or supervision over what is taught or by whom it is taught or where it is taught. Only those who desire, receive it and no penalty direct or indirect, is imposed for failure to exercise the privilege. In fact, the only limitation which can possibly be suggested is that if the parent exercises the right to obtain released time for the purpose of giving his child religious teaching, it must be obtained in good faith, and that the child, during that time, shall use it for the purpose for which he is excused. This is no different from saying that if the parent has his child excused from school for one reason, neither he nor the child shall use the excused time for a purpose foreign to that for which the excuse is granted.

Should it be asserted that to uphold the New York and Oregon statutes the door is to be thrown open to an abusive extension of released time the answer is clear. The law has always recognized that while discretion may be granted, for instance to

administrative agents, and when exercised is not ordinarily the subject of judicial review, nevertheless, when such discretion is abused those suffering from it may seek and obtain relief from the courts; that even where the law, regulation or ordinance is fair and reasonable on its face, if it is administered in a corrupt, unreasonable, unfair and unduly harsh or discriminatory fashion, it will either be struck down or the administrators enjoined from so doing. *Yick Wo v. Hopkins*, 118 U.S. 356.

Thus the Court would undoubtedly follow the practice it has enunciated since the institution of the government in giving every fair presumption to reasonableness, either in State law, municipal ordinance or administrative regulation and to the administrators thereof who exercise discretion; nevertheless, it has the power and would in proper case promptly assert and take jurisdiction to set aside any where it deems reasonableness has been neglected or where administration has become either corrupt, unduly harsh, discriminatory, unfair or unreasonable.

Liberty of conscience, of thought, and of act is of the essence of freedom. Its neglect and destruction throughout vast areas in the world and the unlovely consequences thereof are too fresh in our minds and their impact upon us and others too immediate to permit any attitude in this country, other than of devotion to its establishment and maintenance, even

for the benefit of those whose beliefs and practices, political, economical or religious we do not ourselves approve.

To permit the parent to have his child released from school for a reasonable period of time not substantially affecting his schooling is not an infringement of the First or Fourteenth Amendments; it involves no question of "respecting the establishment of religion"; but is a forthright recognition of the next following clause, "the free exercise thereof."

Too often has the voice and mind of him who vociferously asserts that he demands freedom been found in fact to proclaim a love of and insistence of freedom for himself and those who agree with him and the denial of it to those with whom he differs—a conflict and a contradiction of which he is seldom aware.

To strike down either the New York or Oregon statutes is to deny religious freedom, not to maintain it.

CONCLUSION

In Oregon the practice is to permit reasonable part-time absence from public school for various purposes. The legislative policy is to include among those purposes for which such reasonable part-time absence is allowed, the purpose of obtaining religious instruction outside the public school. It is our submission not only that the legislative policy does not infringe upon the constitutional guarantee of religious freedom, but also that under the circumstances any other policy would discriminate against the exercise of the basic liberty.

Respectfully submitted,

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